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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 784

EVELYN CAMPBELL,
PETITIONER

versus

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

And

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mrs. Evelyn Campbell, plaintiff, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on February 11, 1949 (R. 127), reversing the judgment of the District Court for the Eastern District of Louisiana entered on January 17th, 1948 (R. 114) and rendering judgment for the defendant.

STATEMENT OF MATTERS INVOLVED

Plaintiff, Mrs. Evelyn Campbell, filed this action under the Federal Tort Claims Act (28 U.S.C. 921 et seq. prior to its codification and re-enactment as 28 U.S.C. 1291, 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411, 2412(c) and 2671-2680*) to recover from the United States of America damages for the personal injuries, including permanent disability, pain, suffering and mental anguish, as well as medical expenses, resulting from her being struck and knocked down by a sailor in the regulation uniform of the United States Navy.

The answer filed on behalf of the Government is one of general denial and a specific denial that plaintiff's injuries were caused "by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the plaintiff for such damage, loss or injury in accordance with the law of the place where the act is alleged to have occurred." In the alternative, said defendant pleaded contributory negligence of the plaintiff.

The matter was heard before Honorable Gaston L. Porterie, District Judge, without a jury. There was no conflicting testimony and the evidence adduced, insofar as it relates to the issue whether or not the Government is responsible for plaintiff's injuries, showed that Mrs. Campbell, at about 10:30 P.M. on April 27, 1946, was standing on the sidewalk near the entrance to the Heidelberg Hotel in the City of Baton Rouge, Louisiana, when a group of sailors came running down said sidewalk and one of said sailors, dressed in the regulation uni-

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*All references are to the 1946 codification, and for convenience we shall continue to refer to the statute as the Federal Tort Claims Act.

form of an enlisted man, ran into Mrs. Campbell, knocking her to the sidewalk and causing the serious personal injuries and permanent disability complained of. The evidence also showed that these sailors were members of two groups of sailors traveling on a Navy troop train from the West Coast to the City of New Orleans, Louisiana, under Government Orders WMB 77661 and WMB 77722, that the troop train was in the city of Baton Rouge from approximately 9:30 to 10:30 P.M. on the night of April 27, 1946, during which time said train was iced and serviced. At the time the group of sailors ran down the sidewalk in the direction of the depot, the troop train was slowly moving out of the station and the sailors were attempting to and did board the said troop train before it left the City of Baton Rouge. (See District Judge's Findings of Facts, R. 109).

The District Court held that the sailor who struck Mrs. Campbell was "acting in line of duty" within the meaning of the Federal Tort Claims Act (R. 111), and rendered judgment in favor of Mrs. Campbell and against the United States of America for the injuries suffered by her in the total amount of $21,018.80 (R. 114).

The United States of America appealed to the United States Court of Appeals, Fifth Circuit, which Court without citing a single authority, found that under the doctrine of *respondeat superior* as applied to private persons the Government was not responsible for the acts of the negligent sailor, and reversed the judgment of the District Court and rendered judgment in favor of the defendant.

QUESTION PRESENTED

The principal question involved herein is whether or not under the Federal Tort Claims Act the Government is respon-

sible for the negligent acts of a member of the naval forces "acting in the line of duty" within the well established meaning of that term.

STATEMENT OF JURISDICTION

(1) This Court has jurisdiction to consider and grant this petition pursuant to Title 28, United States Code, Sec. 1254.

(2) The original date of the judgment to be reversed is February 11, 1949 (R. 127). The petition for rehearing was filed on March 2, 1949, within the time provided by the rules of the Court of Appeals for the Fifth Circuit (R. 128), and the petition for a rehearing was denied on April 6, 1949 (R. 139). This petition for *certiorari* was filed within the time prescribed by Title 28, United States Code, Sec. 2101.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In reversing the judgment of the District Court.

(2) In ignoring the plain provision of the law that " 'acting within the scope of his office or employment' in the case of a member of the military or naval forces of the United States, means acting in the line of duty."

(3) In not holding that plaintiff established a prima facie case that the negligent sailor was acting in the line of duty.

(4) In holding that the cases of *Globe Indemnity Company v. Forrest*, 82 S.E. 215 and *Doke v. United Pacific Insurance Company*, 131 P. (2d) 436, did not correctly define the phrase "acting in line of duty."

(5) In not holding that plaintiff established a prima facie case that the negligent sailor was acting within the scope of his employment in accordance with the law of the State of Louisiana.

REASONS RELIED ON FOR GRANTING THE WRIT

(1) The decision of the Court of Appeals is in conflict with the well established jurisprudence of this Court and of Courts of Appeals in other Circuits as well as its own, that statutes must be construed so as to give effect to every word, clause and sentence thereof.

Hellmich v. Hellman, 276 U.S. 233, 48 S. Ct. 244, 72 L. Ed. 544 (1928).

Washington Market Company v. Hoffman, 101 U.S. 112, 25 L. Ed. 782 (1879).

Ex Parte Public Nat. Bank, 278 U.S. 101, 73 L. Ed. 202 (1928).

Aluminum Company of America v. U. S., 123 F. 2d 615 (3rd Cir., 1941).

Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Sheppard, 123 F. 2d 773 (5th Cir. 1942).

(2) The decision of the Court of Appeals violates the well settled rule that the construction placed upon words by those having control of their execution is entitled to considerable weight and will not be disregarded except for cogent reasons.

United States v. Jackson, 280 U.S. 183, 74 L. Ed. 361 (1930).

Norwegian Nitrogen Pro. Co. v. United States, 288 U.S. 294, 77 L. Ed. 796 (1933).

Brewster v. Gage, 280 U.S. 327, 74 L. Ed. 457 (1930).

Broderick v. Keefe, 112 F. 2d 293 (1st Cir., 1940).

American Sugar Refining Co. v. United States, 56 F. Supp. 988 (Ct. Cl. 1944).

(3) The decision of the Court of Appeals is in conflict with the cardinal rule of statutory construction that when particular phraseology is used in statutes and has been construed by those having the administration of the statutes, it must be presumed that Congress in its subsequent legislation adopting the phraseology, used the words according to their known and established interpretation.

Stairs v. Peaslee, 59 U.S. 521, 15 L. Ed. 474, (1856).

Copper Queen Consol. Mining Co. v. Arizona, 27 S. Ct. 695, 206 U.S. 474, 51 L. Ed. 1143 (1907).

National Lead Co. v. United States, 252 U.S. 140, 64 L. Ed. 496 (1920).

Deming v. United States, 37 F. (2d) 818 (C.C.A. of D.C. 1930).

(4) The importance of the Federal Tort Claims Act makes it highly desirable that the provisions thereof, especially the phrase "in line of duty," be properly construed and applied, and a decision, such as that of the Fifth Circuit, so obviously in violation of the provisions thereof should be corrected without delay.

WHEREFORE, it is respectfully submitted that this petition for *certiorari* to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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May 10, 1949

Brief follows:

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

STATEMENT

This is an application for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing a judgment of the United States District Court for the Eastern District of Louisiana.

The material facts and the questions involved are set forth in the foregoing petition. The specification of errors there set forth is here adopted as part of this brief.

THE DECISION BELOW

The opinion of the Court of Appeals (R. 119) is reported in 172 F. 2d 500.

STATEMENT OF JURISDICTION

The statement of jurisdiction set forth in the foregoing petition is here adopted as a part of this brief.

QUESTION PRESENTED

The principal question presented is the meaning of "acting in line of duty" as contained in the Federal Tort Claims Act, as regards liability of the Government for injuries to third persons resulting from the torts of persons in the armed forces of the United States.

CONTENTIONS OF PETITIONER

Petitioner contends that the United States District Court for the Eastern District of Louisiana was correct in finding that the sailor whose carelessness caused petitioner's injuries

was "acting in line of duty" at the time of the commission of the said tort and resulting injuries. We contend that the judgment of the Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court and dismissed petitioner's suit is erroneous and completely ignores the provision of the Federal Tort Claims Act specifically applicable to members of the armed forces.

The pertinent provisions of the Federal Tort Claims Act are as follows:

> "(a) Subject to the provisions of this chapter, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, . . . sitting without a jury, shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, . . . on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting in the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title the United States shall be liable in respect to such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment or for punitive damages. . . ." 28 USCA 931 (a)
>
> * * *
>
> "(b) 'Employee of the Government' includes officers or employees of any Federal agency, members of the military or naval forces of the United States . . . "

"(c) 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in the line of duty." 28 USCA 941.

As pointed out in the foregoing petition, a statute must be construed so as to give effect to every word, clause and sentence thereof. The Court of Appeals in holding that the liability of the United States under the Federal Tort Claims Act is no greater than that of private persons under the doctrine of respondeat superior, has in effect deleted from the statute the provision that " 'acting within the scope of his office or employment' in the case of a member of the military or naval forces of the United States, means acting in the line of duty." (28 U.S.C.A. 941).

The use of the phrase "in line of duty" is unexplained in the legislative history of the act,[1] but it cannot be presumed that Congress was not fully cognizant of the meaning of that phrase. On the contrary, as shown by the cases cited in the petition filed herein, it must be presumed that Congress, in adopting the phrase, used it according to its connotation established by those having the administration of statutes involving the same language in relation to military and naval personnel for the last hundred years. Although less frequently, the courts of our land have also construed the phrase, so it is inescapable that the Congress intended the phrase to be applied as it ordinarily pertains to members of the armed forces.

The following authorities show how the phrase has been interpreted:

a) 7 *Op. Atty. Gen. 149* (1855):

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[1]"Tort Action Against the Government" by Walter Gellhorn and C. Newton Schenck, 47 Col. L. R. 722, 727; and "The Federal Tort Claims Act" 56 Yale Law Journal 534, 540, n. 41.

"He who contracts disease or dies **in consequence of the ordinary performance of his military duty**, or in the performance of any special act of military duty, whether at the moment of performance he were on duty or off duty, in active service, or on furlough, of habits virtuous or habits vicious ****—he, I say, who, in these or any other circumstances, contracts disease, **in the performance of an act of duty**, contracts it 'in the line of his duty' " (Emphasis supplied)

b) *17 Op. Atty. Gen. 172* (1881) recognized as authoritative the opinion previously rendered in *7 Op. Atty. Gen. 149*, particularly since Congress had made no change in the various statutes since the rendition of that opinion by the Attorney General.

c) *Rhodes v. U. S.*, 79 Fed. 740 (CCA 8-1897) held that a disease was contracted in the line of duty if "the service must have been the cause of the disease, and not merely coincident with it in time." Referring to *7 Op. Atty. Gen. 149* and *17 Op. Atty. Gen. 172*, the Court quoted with approval from the former: "In fine, the phrase, 'line of duty' is an apt one, to denote that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury, or the disease, producing disability or death."

d) *Moore v. United States*, 48 Ct. Claims 110 (1913) adopted a more liberal position and stated that "we think that a reasonable construction of it [line of duty] confers the benefit whenever the soldier dies while in the service generally, and submitting to its rules and regulations from wounds or disease not the result of his own misconduct."

e) The basic authority relied on in modern interpretation of the phrase is *32 Op. Atty. Gen. 12* (1919), which states in part:

"the mere fact that an injury or disease is coincident in time with service is not sufficient to class it as suffered or contracted in the line of duty. It may have been caused by the presence of its victim in the line of duty when it was received or contracted, **but the relation of causation is sufficiently shown when it appears that the victim was at a place and doing what was required or permitted by his duty as a soldier**, and that between his presence and conduct and the injury or disease, no adequate and sufficient cause for which he is responsible intervened"; and further, "while in the actual service and submitting to its rules and regulations he is, in general, in the line of duty, and an injury suffered or disease contracted in the line of duty unless it is actually caused by something for which he is responsible, which intervenes between his service or performance of duty and the injury or disease. **He will be responsible for an intervening cause if (1) it consists of his own wilful misconduct or (2) it is something which he has done in pursuance of some private avocation or business.**" (Emphasis supplied)

f) The rule announced above was applied to specific cases in *32 Op. Atty. Gen. 193* (1920) and a third intervening clause added to the two previously adopted as follows:

"Something which grows out of relations unconnected with the service or is not the logical incident or provable effect of duty in the service." *32 Op. Atty. Gen. 193, 195.*

The above outlined scope of the phrase "in line of duty" has been consistently followed by the Judge Advocates General of both the Army and the Navy, under whose jurisdictions the vast bulk of decisions dealing with the point are decided. The Navy has specifically adopted the test applied in *32 Op.*

Atty. Gen. 12 and *32 Op. Atty. Gen. 193.* See *Compilation of Court-Martial Orders 1916-1937* (Navy Department), CMO 5-1920, pages 17-22, CMO 85-1920, pages 16-18, CMO 6-1922, page 18. The Army has also specifically adopted the same test. See *Digest of Opinions of the Judge Advocate General of the Army*, 1912-1940, page 952 et seq.

No specific decision in point with the present facts has been found in the reported decisions of the Judge Advocates General of either the Army or Navy, but the following are believed analogous:

a) A soldier on his way from his duty to lunch jumped from the side of a moving private automobile and was injured. This injury was held to be in the line of duty. *(Digest of Opinions of the Judge Advocate General of the Army*, 1912-1940, page 960).

b) A soldier who was injured in an automobile collision after riding on the running board of a speeding automobile was held to be in the line of duty—that "while gross negligence may take a case out of line of duty, mere negligence without the element of willful negligence, as in this case, does not***." *(Digest of Opinions of the Judge Advocate General of the Army*, 1912-1940, page 960).

c) A soldier on pass had to catch a particular train in order to return to his station. This train and another going to a different place left the depot at about the same time. The train going to the other place left first; as it was leaving, the soldier was seen running up the street of the town toward the depot. He attempted to catch the moving train, but fell under its wheels and was killed. His death was held to be in line of duty. *(Digest of Opinions of the Judge Advocate General of the Army*, 1912-1940, page 962).

These authorities have arisen out of the administration of statutes governing benefits to members of the armed forces and their dependents, but the phrase "acting in line of duty" has also been construed in cases growing out of insurance contracts.

In *Globe Indemnity Company, et al. v. Forrest*, 165 Va. 267, 182 S.E. 215 (1935), suit was brought by an enlisted member of the Virginia National Guard. Insofar as the case concerns the issue at bar, the suit was against the Globe Indemnity Company as the insurer of the State of Virginia against liability under the Virginia Compensation Act. The claimant was injured while returning to camp from an evening's amusement at nearby Virginia Beach. The insurance carrier contended that the accident resulting in the claimant's injuries did not arise out of and in the course of claimant's employment. The following language is quoted from the opinion of the Virginia Supreme Court affirming a Commission's allowance of compensation:

> "As to the first contention, the carrier urges that, when the claimant was given a pass to leave the military reservation for Virginia Beach and proceeded to avail himself of its privileges, there was a cessation of the relation of master and servant between himself and the State of Virginia, his employer.
>
> "If this case involved ordinary civil employment, this position might or might not be sound, depending upon the circumstances of the particular case.
>
> "But here is an instance of an enlisted soldier in the military service of the state and called to perform active duty for a specific period of time under the orders of constituted military authority. This period of the rela-

tionship referred to began on August 3, 1933, and continued for two succeeding weeks, which included the time when the claimant was at Virginia Beach on the temporary leave issued to him.

"We cannot agree that this constituted a severance of the relation of master and servant.

"As is pointed out in the claimant's brief, his contract of service with his employer is to be found in his enlistment record which contains his declaration as to its terms and conditions and his oath of enlistment.

"The pertinent parts of these are as follows:

> 'Having been fully informed of the nature and terms of this enlistment contract, the length of the term of service, the amount of pay and other allowances, and the contract having been read to me before being signed by me, and being thoroughly understood by me, I do make the following declaration: 'I do hereby acknowledge to have voluntarily enlisted * * * as a soldier in the National Guard of the United States and of the State of Virginia * * * under the conditions prescribed by law unless sooner discharged by proper authority * * * that I will obey the orders * * * of the Governor of the State of Virginia, and of the officers appointed over me according to law and the rules and Articles of War.'

"We are quite in agreement with the position of the claimant as expressed by this paragraph from his brief:

> 'By virtue of the contract of employment it is submitted that the relationship of master and servant was continuous from the moment when Forrest reported at Hampton, Virginia, in compliance with the orders from his employer, the State of Vir-

> ginia, until he was released from active employment by the termination of said orders, unless he was sooner discharged by proper authority or by the expiration of the period for which he (actively) enlisted. The relationship of master and servant was not broken when Forrest went to Virginia Beach on pass. This pass, or temporary leave of absence from his duties at the camp, was nothing more than a permission for him to absent himself for a few hours for recreation. During this period his employment continued for the reason that he was still in the character of a soldier and never dropped this character for one minute.'

"And further:

> 'When he is permitted time away from the place of encampment, he is nevertheless an employee because he is a full time soldier and is being paid for the full period of two weeks and not for two weeks less such time as he may be on pass. When he is on pass or temporary leave of absence, he has no control over his movements except such as may be specially permitted.'

"The enlisted soldier, during his enlistment, and particularly during the active specific period of duty, never doffs the habiliments of his profession, to the extent of being beyond military orders and control. A pass granting temporary leave for recreational purposes cannot change this status any more than a leopard can change its spots. It would be dehors the principles of military science if it were otherwise."

Doke vs. United Pacific Insurance Company, 15 W. 2d, 536, 131 P. 2d 436, affirmed on rehearing, 135 P. 2d, 71 (1943) involved an action based upon a policy of insurance issued by the United Pacific Insurance Company insuring all members

of the National Guard of the State of Washington for loss of life, etc. The insuring clause contained the following paragraph:

> "This policy insures against loss or disability resulting directly and exclusively of all other causes, from accidental bodily injury sustained during the term of this policy and caused by service classed as incurred in line of duty as a National Guardsman, including guard duty, participation in drills, parades, practice or instruction in an armory or in the field when this organization under command of officers, including the annual encampment or while traveling to and from encampment, hereinafter referred to as 'Such injury'."

The decedent was an enlisted member of the National Guard and the Court found as a matter of fact that he was injured while on his way to the armory to attend drill. One of the questions decided was whether or not the decedent was "in line of duty" prior to the time that he would reach the armory.

After quoting from 7 Op. Atty. Gen. 149 (1855) the Court pointed out that the criterion adopted by the Attorney General had been approved in *Rhodes v. United States*, 8 Cir., 79 F. 740; *Moore v. United States*, 48 Ct. Cl. 110; *Hutchens v. Covert*, 39 Ind. App. 382, 78 N.E. 1061; and in the War Risk Insurance Act 40 Stat. 611, Sec. 300; and reaffirmed in 32 Op. of Atty. Gen. 12. With reference to these authorities, the Court made the following observation:

> "All of the authorities just cited related to military service in some form in the Army of the United States. However, we see no reason why the phrase 'in line of duty' should not be given the same meaning when it appears in an insurance policy covering the members of the National Guard of the state.

"Our view is that Judson was 'in line of duty' at the time he was injured."

Although approving of these two decisions, the Court of Appeals, without distinguishing them from the case at bar, and without giving any reason for doing so, refused to follow same.

It is true that as heretofore used in connection with military and naval personnel, the phrase "in line of duty" has not been applied as a test of agency. However, in view of the Government's own interpretation of "acting in the line of duty," as well as the meaning given same by the courts in civil matters, we can not believe that Congress intended that a different interpretation of the term should be made in applying the Federal Tort Claims Act of 1946. There is nothing in the act itself which suggests that the same rules that govern private individuals should control the Government's liability for the tortious acts of the members of the military or naval forces of the United States. On the contrary, the Act specifically provides that "in the case of members of the military or naval forces 'acting within the scope of his office or employment' means acting in line of duty." By all the rules of construction, and by precedence, we submit that the sailor who negligently ran into the plaintiff was acting in the line of duty within the meaning of the statute when the injury involved herein occurred. The evidence supports the following conclusions:

a) Naval personnel on a troop train under orders are clearly in the duty status;

b) Leaving the train while it remained at the depot for one hour, to be watered and iced, was incidental to a continuation of the journey from the West Coast on the troop train;

c) In endeavoring to return to the troop train as it began to leave, as duty certainly required them to do, these sailors brought about the accident complained of;

d) These men were actually in line of duty as none of the three exceptions to the rule is applicable, that is, (1) the accident was not the result of their own wilful misconduct, (2) nor was it related to a private business or avocation, (3) nor did it arise out of some relationship unconnected with the service or which was not an incident of duty in the service.

It is submitted, therefore, that in accordance with the accepted definition of the term, the Naval enlisted personnel who negligently injured the plaintiff were "acting in line of duty" and the United States is responsible in damages under the terms of the Federal Tort Claims Act of 1946.

Furthermore, the plaintiff having shown that the careless sailor who injured Mrs. Campbell was traveling under government orders and was dressed in the regulation uniform of the United States Navy, there was raised a prima facie presumption that the sailor was acting in line of duty. As the government did not rebut this presumption, it is liable under the doctrine of respondeat superior. The Louisiana Courts have so held in cases involving private individuals.

The Court said in *Whittington vs. Western Union Telegraph Co., Inc.*, 1 So. 2d 327 (La. App., 2nd Cir. 1941):

> "The cyclist Bell, at the time of the mishap, was attired in a complete Western Union Company uniform, and, admittedly, in the employ of defendant. These factors create a presumption, but one of the inconclusive and re'buttable kind, that he was then acting in the course and scope of his employment. *Middleton v. Humble*, La.

App., 172 So. 542; *Kendricks v. Lewis*, La. App., 175 So. 484."

In *Futterman vs. Western Union Telegraph Co., Inc., et al*, 43 Fed. Supp. 729 (D.C. La. 1942), the Court said:

> "/2/2. The doctrine of respondent superior applies where an employee is acting in the course of his employment and within the scope of his authority.
>
> "/3/3. An inconclusive and rebuttable presumption that he was then acting in the course and scope of his employment as a messenger for the Western Union Telegraph Company existed on the occurrence of the accident in which Andrew A. Lafaso was involved, from the fact that he was then garbed in the uniform of such a Western Union messenger."

The same rule prevails in other jurisdictions. See *Tipton vs. Western Union Telegraph Co.*, 68 Fed. Supp. 854 (Dist. Ct. of D.C. 1946) in which the Court said:

> "***True it is that in the case just cited and in the case at bar the messenger boy was an employee of defendant and was wearing its uniform, and the collision occurred near the defendant's place of business. Conceding, as it must be, that this raised an inference that he was acting within the scope of defendant's business, such an inference ceases when there is uncontradicted proof to the contrary.***"

In each of the foregoing cases, the defendant proved that the employee was not at the time of the accident engaged in the employer's business. Nevertheless, they are authority for the principle that a prima facie case is made out by the showing that the person who inflicted the injury was an employee

of the defendant and that he was at least in the uniform of his employer. Proof that Mrs. Campbell's injuries resulted from the negligence of a sailor admittedly in the uniform of the U.S. Navy made the burden shift to the Government to show that the sailor was not in the line of duty within the meaning of the act.

If the Court is to use the same criterion used in automobile cases, as the Government would have it to do, then the following language found in the case of *May vs. Yellow Cab Co.*, 164 La. 920, 114 So. 836 (1927), which is the leading case in Louisiana on the subject, is applicable:

> "We may say, however, that the great weight of authority, both from text-writers and the decisions of the highest courts of the states, seem to recognize the rule that, in an action for an injury or damage inflicted by an automobile, an allegation and proof showing the ownership of the automobile, and that it was being operated at the time by an employee of the owner, is sufficient to make out a prima facie case and to raise the presumption that the servant was acting within the scope of his employment, and that the burden is then thrown on the owner to show to the contrary.***"

The Government introduced no evidence and therefore utterly failed to rebut the presumption created by plaintiff's evidence. Instead it urges, and the Court of Appeals for the Fifth Circuit has acceded to the Government contention, that the evidence failed to show "why, or the circumstances under which the sailor was where he was when he struck her, or that he and the group with him were acting under command or orders at the time." We submit that the evidence does show these things.

The record shows that two groups of sailors were traveling under Government orders from the West Coast of the United States to the City of New Orleans and points East, that the groups were under the command of a lieutenant junior grade and an ensign, that this troop train stopped in Baton Rouge, Louisiana, on the night of the accident for one hour to be iced and serviced by the carrier (R. 9). The testimony shows that sailors from both groups were running to catch the train when one of them, an enlisted man, negligently and carelessly ran into the plaintiff and seriously and permanently injured her. **The record is barren of any proof that these sailors were not under Government orders during the hour that they spent in Baton Rouge.**

Witness Harold Quinlivan testified that:

"***Apparently, the sailors were running in order to catch that train.

"***

"***one sailor who was running bumped into Mrs. Campbell, striking her with his left shoulder as he was passing to the North of her. His left shoulder or side struck her left shoulder or side.

"I cannot describe the person who struck her in detail. However, I know that he was wearing a dark blue Naval (enlisted man's uniform). He was not a large man.

"After the sailor struck Mrs. Campbell, he continued to run westward toward the moving train without stopping." (R. 11)

Witness Stephen Stall corroborated Quinlivan except that he did not actually see any of the sailors bump into Mrs. Camp-

bell. However, he did observe that "The sailors continued running down to the tracks without stopping and jumped on the moving train. The train was moving slowly and as it passed from my sight, several of the sailors were running down the track after it." R. 12 and 13).

The plaintiff, Mrs. Campbell, testified that the troop train was moving in the direction of New Orleans less than a block away when a sailor ran into her and knocked her down (R. 32 and 33). The sailor was of medium size and in regulation uniform (R. 34 and 49).

Miss Ruth Campbell stated that these boys were dressed in the regulation Navy uniform (R. 59); that when she saw the troop train at the moment of the accident the train was in motion and the sailors were headed in its direction (R. 62).

E. F. Webb said that these sailors, who were dressed in uniform, were running toward the train (R. 100, 101 and 102).

This evidence and testimony justified the trial judge's findings of fact that even though the identity of the sailor who negligently ran into Mrs. Campbell was not established, he was one of a group of sailors being transported under Government orders and was under the command of Lt. J. G. David M. Hysinger or Ensign Clifford A. Hemmerling (R. 109 and 110). In his discussion of this point the learned District Judge said:

(R. 112)

> "Counsel for the Government makes much of the point that the service men involved here were not in direct control of any of their officers—as to say, that there was no squad, platoon, or company, in formation, in charge of a sergeant, a lieutenant, or a captain, respectively,

when the injury was inflicted; that in the instant circumstances the tort liability of the sovereign does not arise.

"The men, from the circumstances, had at least the tacit approval or implied permission of their officers to leave the train being serviced at the Baton Rouge station. They wanted relaxation and, also, to go to eating and refreshment spots nearby—within a city block. The slowness with which the train left Baton Rouge to go to New Orleans showed that its operators knew that many of the men had gone to town and needed a chance to get back on. From the record we infer that none was left behind; the very slowly leaving train got all of them.

"Furthermore, these men running to the Government chartered train were obeying orders of their Government to go to New Orleans; they were not running to catch a train taking them to an amusement spot or a baseball park for their own individual and discretionary pleasure.

"There, we believe, is the dividing line in the interpretation of the qualification, 'acting in line of duty'."

The Government offered no proof whatsoever to contradict the foregoing evidence, which we submit shows definitely that the sailors were traveling under Government orders and under the command of commissioned officers at the time of the accident.

The *ratio decidendi* of the opinion rendered by the Court of Appeals is apparently that a member of the Armed Forces is acting "in line of duty" only when he is being marched in ordinary formation or advancing or retreating in simulated warfare or in driving a vehicle or something else of a similar character, under the direct command and in the presence of his commanding officer. Such a narrow construction of this language completely ignores the definition of the term used

for more than a century and gives it a meaning never intended by the United States Congress.

It is just as important today as it was in the days of the Revolutionary War for our fighting forces to be physically fit and mentally alert at all times whether or not they are actually engaged in physical combat which consumes an infinitesimally small amount of time compared to the many hours of training required to condition them for battle. Many hours are spent in physical exercise and in recreation, for it is recognized that these things are just as important in the training of fighting men as teaching them to shoot a gun, drop a bomb from an airplane or torpedo a battleship.

Even admitting that the interpretation of the Act should be reasonably strict, as was held by the trial judge, the holding of the Court of Appeals is so narrow as to strike a portion of the language from the Act and render the Act practically worthless when applied to military or naval personnel. In fact, the holding of the Court of Appeals applies a more restrictive test as regards personnel in the Armed Services than is concededly the rule as regards the employees of private persons.

SUMMARY

For these reasons, it is submitted that petitioner herein was seriously and permanently injured by the negligence and carelessness of a sailor traveling under government orders and then acting in line of duty within the meaning and intendment of the Federal Tort Claims Act. It is also submitted that under the undisputed facts of this case if the sailor had been a civilian employee dressed in the uniform of his civilian em-

ployer rather than in that of the United States Navy, petitioner would be entitled to recover by virtue of the prima facie case established by her and not rebutted by the defendant. The petition for *certiorari* should, therefore, be granted.

Respectfully submitted,
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